IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

TUESDAY, THE 19TH JUNE 2007 / 29TH JYAISHTA 1929

WP(C).No. 534 of 2004(L)

PETITIONER:

K.T.HASSAN,S/O.KUNJALIKUTTY, RESIDING AT KANNACHANTHODI VEEDU, ARIYANALLOOR,PARAPPANANGADI, THIROOR TALUK REPRESENTED BY HIS POWER OF ATTORNEY HOLDER C.N.SIVASANKARAN, AGED 63 YEARS, S/O. NEELAKANDAN, RESIDING AT CHETHIMATTOM HOUSE, KADAMALOORKARA, AYMANAM VILLAGE, KOTTAYAM.

BY ADV. SRI.NAIR AJAY KRISHNAN
SRI.A.S.SABU
SRI.NAGARAJ NARAYANAN

RESPONDENTS:

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1. KASIM KUNJU ISMAIL PILLA, AGED ABOUT 46 YEARS, S/O. KASIM KUNJU, RESIDING AT N.S.S.VEEDU, KANYAKULANGARA, MELEVILA VEEDU, VEMBAYAM, THEKKADA VILLAGE PRESENTLY EMPLOYED AT P.O.BOX NO.2235, ABU DHABI, U.A.E.

2. ABDUL SATHAR, AGED 43 YEARS, S/O.ACHUMMADAKATH, KURUVATTU KIZHAKKEPARAYIL HOUSE NEAR JUMA MASJID, KUNHIMANGALAM, KANNUR.

BY ADV. SRI.T.A.UNNIKRISHNAN
SRI.K.SATHEESH KUMAR

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 19/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WP(C).No. 534 of 2004(L)

APPENDIX

PETITIONER'S EXHIBITS:

EXHIBIT-P1: COPY OF AFFIDAVIT OF LOAN DATED 07-03-1995

EXHIBIT-P2: COPY OF PLAINT IN O.S. NO.24 OF 1998 OF THE SUBORDINATE JUDGES COURT, NEDUMANGAD

EXHIBIT-P3: COPY OF RETURNED SUMMONS

EXHIBIT-P4: COPY OF JUDGMENT IN O.S.24 OF 1998 OF THE SUBORDINATE JUDGES COURT, NEDUMANGAD

EXHIBIT-P5: COPY OF DECREE IN O.S. NO.24/98 OF THE SUBORDINATE JUDGES COURT, NEDUMANGAD

EXHIBIT-P6: COPY OF I.A. NO.369/02 IN O.S. 24/98

EXHIBIT-P7: COPY OF I.A. NO.370/02 IN O.S.24/98

EXHIBIT-P8: COPY OF THE ORDER IN I.A. NO.369 & 370/02 IN O.S. 24/98

/TRUE COPY/

P.A. TO JUDGE

PIUS C.KURIAKOSE, J.

WP (C) NO. 534 of 2004

Dated this the 19th day of June, 2007

JUDGMENT

Exhibit - P8 order by which the learned Subordinate Judge dismissed two applications preferred by the plaintiff, one for amendment of the judgment and decree so as to correct the name of the defendant as Ismail Pilla S/o. Kassim Kunju instead of Kassim Kunju, S/o. Ismail Pilla and another for making similar corrections in the plaint is under challenge in this Writ Petition under Article 227 of the Constitution of India instituted by the plaintiff. Exhibit - P2 is the copy of the plaint instituted by the petitioner, which is one for recovery of money on the basis of a transaction between the petitioner and the 1st respondent. The name of the 1st respondent is written in Exhibit-P2 as Kasim Kunju aged about 36, S/o. Ismail Pillai. The relief is claimed only against the 1st defendant Kassim Kunju, S/o. Ismail Pilla. Several attempts were resorted to serve summons on the 1st defendant in Ext.P2 failed. Resort was taken to substituted mode of service and even publication in newspaper was effected. Ultimately, the 1st defendant was set ex parte and the suit was

decreed against him. But in execution proceedings it was reported by Ismail Pilla, the recipient of the notice, the 1st respondent herein that the decree is not executable against him and that the decree is against Kassim Kunju only.

2. The petitioner/plaintiff filed two applications, one for correction of judgment and decree under Sections 151, 152 and 153 of the Code of Civil Procedure and another for impleadment of Ismail Pilla on the ground that it was Ismail Pilla who was intended to be sued and not Kassim Kunju who was father of Ismail Pilla. These applications were dismissed by the learned Subordinate Judge giving liberty to the petitioner to pursue appropriate other remedies. Accordingly, the present applications I.A. No.369/02 and I.A. No.370/02 were filed subsequently. The learned Subordinate Judge has dismissed the applications mainly on the reason that allowing the application will necessitate cancellation of the ex parte decree passed against Kassim Kunju and that the same cannot be done on an application filed by the plaintiff since the provisions of Order 9 Rule 13 applies only to applications submitted by the defendants. The learned Subordinate Judge also observed that it will not be

fair to allow the amendment so as to make the judgment and decree binding on the 1st respondent since the summons was admittedly not served on him directly. In other words, the learned Subordinate Judge was worried that granting of the amendment application will result in denying opportunity to the respondent to contest the suit.

3. It has been repeatedly held by the Supreme Court that when interests of technicalities and those of substantial justice are putted against each other, the court shall strive to advance the interests of substantial justice. It is crystal clear and the learned Subordinate Judge also practically agrees that the party whom the petitioner wanted to sue was Ismail Pillai and that the name of Kassim Kunju, S/o. Ismail Pillai, the father of the present respondent was shown in the plaint by mistake. I find on a reading of Ext.P2 plaint that though the names of the son and father were written wrongly, the age of the respondent, which is given against the name of the 1st defendant in the suit, and the averments in Ext.P2 will show that the cause of action upon which the the suit is instituted is a transaction which took place in Abu Dhabi where the petitioner and the respondent

were working together. The documents which were produced along with the plaint particularly the sworn affidavit relied on as Item No.1 in the plaint is an affidavit sworn to by the respondent, who was at that time working in Abu Dhabi. I am convinced that the impleadment of Kassim Kunju instead of Ismail Pilla as the 1st defendant in the suit is the result of a mistake for which the draftsman of the plaint is to be blamed more than the plaintiff himself. Learned Subordinate Judge also discernibly thought that interest of justice demands grant of the applications. The learned Subordinate Judge has certainly viewed that it is not right to deny an opportunity to the respondent to resist the suit. That view is certainly a correct one.

4. Having considered the totality of the circumstances attending on this case, I feel that the extra-ordinary visitorial jurisdiction under Article 227 must be invoked in this case so as to advance the cause of rendering substantial justice between the parties.

5. Accordingly, I set aside the decree passed against the 1st defendant in Ext.P2 plaint. Even otherwise the decree passed against Kassim Kunju, a deceased person is a nullity and

could be ignored. I.A No.369/2002 and I.A No.370/2002 will stand allowed. The suit O.S. No.24/1998 will be re-posted by the learned Subordinate Judge, who after ensuring that necessary corrections are made, will issue fresh summons to the 1st defendant therein. It is not necessary to issue notice to the 2nd defendant. The 1st defendant upon receiving summons will be entitled to file written statement raising all available contentions. This court will not be justified in awarding costs to the respondent. But the inconvenience caused to the court on account of the carelessness in the drafting of the plaint is to be taken note of. Noticing the said inconvenience, I make the above orders conditional upon the petitioner paying an amount of Rs.3,000/- to the credit of High Court Legal Services Committee, within a period of three weeks from today, failing which payment, the writ petition will stand dismissed.

This writ petition is conditionally allowed as above.

Sd/-
(PIUS C. KURIAKOSE, JUDGE)

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/True copy/

P.A. to Judge

K.THANKAPPAN,J

CRL.A. NO.92 OF 1999

ORDER

25th May, 2007